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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 587

GEORGE THOMAS BECK, JR., *Petitioner,*

v.

STATE OF FLORIDA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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INDEX

	Page
Petition for Writ of Certiorari to the Supreme Court of the State of Florida	1
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	3
Statement	4
Reasons for Allowing the Writ	7
Argument	9
Conclusion	12

Appendix:

Denial of Petition for Rehearing by the Supreme Court of Florida	1a
Denial of Petition for Writ of Certiorari	2a
Opinion of the District Court of Appeal of Florida, Second District	3a

CITATIONS

Brinegar v. United States, 338 U.S. 160	8
Carroll v. United States, 267 U.S. 132	8
Clay v. United States, Ga. 1956, 239 F. 2d 196	11
Patenotte v. United States, Miss. 1959, 266 F. 2d 647	11
Simpson v. United States, Wyo. 1965, 346 F. 2d 291	10
Sisk v. Lane, Ind. 1963, 29 F. Supp. 507, affirmed 331 F. 2d 355, certiorari dismissed 380 U.S. 959	10
Staples v. United States, Fla. 1963, 320 F. 2d 817	11
United States v. Di Re, 332 U.S. 581	8
Watson v. Stone, 4 So. 2d 700	9
Constitution of the State of Florida, Section 22 of the Declaration of Rights	12
Constitution of the United States, Fourth Amendment	3, 7, 12
Florida Statutes, Section 790.05	9
Rule 19, Supreme Court of the United States	2
28 USCA 1257	2

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STATE OF FLORIDA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

To: The Honorable The Chief Justice of The United States and the Honorable Associate Justices of The Supreme Court of the United States:

Your petitioner, GEORGE THOMAS BECK, JR., respectfully prays that a writ of certiorari issue to review the judgment of The Supreme Court of the State of Florida, entered May 23, 1966, and Order denying Petition for Rehearing dated June 24, 1966, affirming an opinion of the District Court of Appeals of the

State of Florida, Second District, filed January 5, 1966, which Opinion affirmed a judgment of conviction in a criminal case.

OPINIONS BELOW

There was no opinion in the Supreme Court of the State of Florida, the Order being a denial of Petition for Certiorari to review the Opinion of the District Court of Appeals, Second District of Florida.

The Opinion of the District Court of Appeals, Second District of Florida, rendered January 5, 1966, is reported in 181 So. Reporter, at page 659 and is contained in the certified Transcript of Record herein and in the Appendix to this petition.

JURISDICTION

The jurisdiction of this court is invoked under Title 28, Section 1257, United States Code Annotated, and Rule 19 of the Supreme Court of the United States.

The judgment of the Supreme Court of the State of Florida was entered May 23, 1966, and the Petition for Rehearing was denied June 24, 1966.

QUESTIONS PRESENTED

I

A search of an automobile is an unlawful and unreasonable search when made without the consent of the owner, without the benefit of a search warrant, not made as the result of nor to make effective a lawful arrest, or made when neither a felony or misdemeanor has been committed in the presence of the searching officer, especially where the automobile is not a present means of flight or likely destruction of evidence.

II

A lawful or reasonable search of an automobile not occupied or being used in flight may be made only when:

1. A crime has been committed in the presence of the searching officer;

2. Under a valid search warrant issued upon probable cause;

3. To make effective a lawful arrest;

4. When the owner of the automobile has waived his constitutional rights and consented thereto; or

5. When a felony has been committed and the searching officer has probable cause to believe that the automobile was used in the perpetration of the crime or carried the results thereof, and the officer was possessed of information and facts and circumstances with reasonable inferences fairly to be drawn therefrom, which would lead a reasonably intelligent and prudent person to conclude that there is ground to believe that the law is being violated through the use of the particular automobile.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the Constitution of the United States of America provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT

In the Criminal Court of Record in and for Palm Beach County, Florida, the petitioner was convicted of the crime of Robbery (R-26).

Before trial the petitioner filed a motion to quash and suppress, wherein petitioner moved the court to quash the search of his automobile and to suppress all evidence obtained thereby (R-2). The motion was heard by the trial judge and denied (R-19).

The evidence, both upon the hearing of the motion and upon the trial of the cause, showed the following facts:

On May 8, 1964, in the Town of Palm Beach, Palm Beach County, Florida, a business known as Randy's B & G Liquor Store, at about 8:00 o'clock in the evening, or a little prior thereto, was entered by a person who after inquiring as to the price of certain items of merchandise (R-86), produced a gun and demanded the money in the cash register, which demand was complied with by the clerk then in charge of the store (R-88).

After the occurrence of the events just referred to, the alleged robber left the place of business with the money, got into a car and drove away (R-128-129).

The alleged robbery was reported to the Police Department of the Town of Palm Beach, Florida, which immediately began a search of the town for a person answering the description given by the persons in the store at the time of the incident just described (R-130).

In the Town of Palm Beach, Florida, there was a night club known as Palm Beach Athletic Club, which

was located a few blocks from the place of business in question (R-132-133).

One of the so-called eye witnesses, namely, Joseph Rubin, testified that he drove to the Palm Beach Athletic Club, at which place he saw a police officer who asked the witness to describe the car that was involved in the alleged robbery (R-133), at which time the witness described the vehicle which was similar to a car in the club's parking lot, and upon approaching the car, the officer opened the door. During the questioning of this witness, the petitioner raised the point as to the legality of the search of petitioner's automobile (See discussion R-135-137, inclusive).

After this discussion, the petitioner was placed upon the witness stand and testified regarding the search and seizure and his arrest. This testimony begins on page 139 of the Record, the petitioner testifying therein that at no time did he give anyone permission to enter his automobile or to search the same, and that at the time of the alleged unlawful search he had not been placed under arrest for any crime or offense committed in the presence of the searching officers.

After the testimony of the petitioner, and a discussion as to the search (R-143-147), the searching officer was placed on the stand (R-147), and testified upon questions propounded by petitioner's attorney.

This witness, Donald W. Krichbaum, testified that he examined the automobile before ever placing the petitioner under arrest.

It was not until after this officer had examined the automobile and saw what he stated was a pistol lying on the seat (which is not unlawful), that he went inside

the club and finding the petitioner there, took him outside, at which place he said he placed the petitioner under arrest (R-155-156).

Particular attention is directed to the testimony of Officer Harry E. Nelson, beginning on page 157 of the Record, wherein he described the search of the automobile which was made immediately upon his arrival at the club.

He stated that he flashed his light in the window of the car, saw a revolver on the seat and opened the door of the car, picked up a bag, saw money in it and completed the search (R-158).

The officer who actually made the search testified:

> "... I just had reasonable *doubt,* that evidence was there, a felony having been committed, and as long as the car wasn't locked I believed I had the right to flash my light in the car and take that evidence." (R-159).

This officer then testified that at this point the petitioner was inside the club and had never come out of the club or been placed under arrest (R-159), because the respondent's witness, Donald W. Krichbaum, had testified that he had never placed the petitioner under arrest until after he had taken the petitioner from the inside of the club to the outside.

The state witnesses testified emphatically that the search of the petitioner's automobile was made and in fact completed before the petitioner was placed under arrest and that the same was conducted and completed without the consent of the petitioner.

Petitioner, as aforesaid, was convicted of robbery and received a sentence of ten (10) years at hard labor.

On appeal to the District Court of Appeals, Second District of Florida, the judgment and sentence was affirmed (see Appendix) and certiorari to the Supreme Court of the State of Florida was denied (see Appendix).

REASONS FOR ALLOWING THE WRIT

I

The Fourth Amendment has since its inception constituted a firm and definite guarantee from the federal government to protect the basic rights of the individual and is unequivocal in its terms.

Although this court has carefully delineated and defined the extent of the right to search incident to a lawful arrest in other areas and under circumstances, the question as to whether or not the Fourth Amendment permits the search of an automobile while the driver is outside of the automobile and in a building or place of business and not under arrest is a question of nationwide appeal, not only because of its novelty in this court but because of the frequency of its occurrence in various forms in criminal trials. The question is of great importance for future guidance in trials of criminal cases wherein such questions arise.

The question as to whether or not a citizen retains his right of privacy in his effects contained in his automobile, and where he is available and in the vicinity and subject to arrest, but is not under arrest, is one that warrants the attention of this court by the allowance of the writ herein prayed. The writ should be allowed because a definition of the citizen's rights in this area by this court could possibly properly advise inferior trial courts, particularly where the search of

the automobile and the seizure of its contents is based solely upon conjecture or suspicion. At present, these inferior courts can only be guided by their varying interpretations of decisions of this court upon related and similar subjects which do not undertake to define and resolve the question here presented, particularly in view of the fact that this case does not come within the ruling in *United States v. Di Re,* 332 U.S. 581; *Brinegar* v. *United States,* 338 U.S. 160; *Carroll* v. *United States,* 267 U.S. 132, for in these cases the search of the automobile was not made under the circumstances as here presented.

II

The petition should be granted in the present case for the following reasons, i.e.: although there was testimony that a robbery had been committed, the police officer in the parking lot where petitioner's automobile was parked knew none of the facts other than that the automobile used by the alleged robber was similar to one in the parking lot; the accused was not in the automobile but was in what is known as a nightclub adjacent to the parking lot and was not at the time of the search under arrest; the searching officer on being told that the automobile was of the same make or similar to that alleged to have been used, went to the automobile, opened the door and flashed his light inside and seeing a pistol lying on the front seat, made a complete search of such automobile and actually testified that he made the same on bare suspicion, or as he expressed it, ". . . I just had reasonable doubt, that evidence was there, . . ." (R-159).

The decision of the District Court of Appeals, Second District of Florida, (see Appendix), and the

Order of the Supreme Court of Florida denying certiorari, and therefore affirming such Opinion (Appendix), should be examined by this court because of its importance in future criminal trials and because its logic is contrary to the law as expressed by this court in other cases involving similar propositions of law but probably dissimilar in factual circumstances. The inherent power of this court to formulate rules of evidence guided by considerations of justice and the rights of the citizen under the Constitution of the United States of America should be invoked in this case.

ARGUMENT

I

A Pistol Carried in an Automobile in the State of Florida Is Not Unlawful and Is Not Considered Contraband.

While petitioner was inside a nightclub known as the Athletic Club in the Town of Palm Beach, Florida, a police officer examined his automobile and seeing a pistol lying on the front seat made a systematic search of said automobile. It is conceded that if the searching officer had seen contraband in the automobile of the petitioner, he would have been justified in making a search.

Under the laws of the State of Florida, a pistol is not considered contraband, nor is it unlawful for a person to have a pistol in his automobile. *Section 790.05, Florida Statutes,* declares it to be a crime for carrying a concealed pistol or rifle without first obtaining a license. However, this statute was construed in the Florida case of *Watson* v. *Stone,* 4 So. 2d 700, wherein the law was settled in Florida that the having of a pistol or repeating rifle in an automobile is not within the purview of the statute.

II

The Search of an Automobile Not Being Driven or Occupied by the Owner and Not Made as the Result of or To Make Effective a Lawful Arrest Without a Search Warrant, Is an Unreasonable Search Unless the Officer Making Such Search Has Probable Cause To Believe That Such Automobile Contained the Fruits of a Crime or Had Been Used in the Commission of a Felony.

This automobile was not being driven, it was left in a parking lot without any attendant and there was never any reason given why a search warrant could not have been obtained provided there was sufficient cause for the issuance of a search warrant.

Search without warrant of an automobile remote in location from place of defendant's arrest constitutes illegal entry and all information acquired because of such search is inadmissible. See *Simpson* v. *United States,* Wyo. 1965, 346 F. 2d 291.

It was held that where state officers had no search warrant, evidence obtained by them from search of an automobile must be the product of a search incident to a lawful arrest. See *Sisk* v. *Lane,* Ind. 1963, 29 F. Supp. 507, affirmed 331 F. 2d 335, certiorari dismissed 380 U.S. 959.

The evidence discloses beyond doubt that the search of the automobile was made and then petitioner placed under arrest. Apparently the arrest of the petitioner is attempted to be justified by the results of the unlawful search of petitioner's automobile.

We again refer to the statement of the searching officer, wherein he testified:

> ". . . I just had reasonable doubt, that evidence was there, a felony having been committed, and as

long as the car wasn't locked I believed I had the right to flash my light in the car and take that evidence." (R-159).

It therefore is clear that the search was made upon "bare suspicion."

The search of this automobile could not be justified as done with probable cause where there was no more than suspicion that it might be an automobile used in the commission of a crime or contain the products thereof. *Staples* v. *United States,* Fla. 1963, 320 F. 2d 817. This case does not come within that class of cases where the automobile was occupied and the occupant or owner placed under arrest and a search made as incident thereto or for the purpose of making effective a lawful arrest.

As we have stated, this automobile was stationary, parked, and unoccupied.

The mere fact that the subject of a search is an automobile, or occupant thereof, does not let down the bars altogether, especially where the automobile is not the present means of flight or likely destruction of evidence, or where transportation itself is not a crime. See *Patenotte* v. *United States,* Miss. 1959, 266 F. 2d, 647, and *Clay* v. *United States,* Ga. 1956, 239 F. 2d 196, and cases cited therein.

The right of law enforcement officers to search without a warrant under certain conditions is not here questioned. But to make a search of petitioner's automobile under the circumstances before this court is a question of great importance. There is a need for a decision by this court treating of the extent of officers in the search of an automobile under the circumstances

here presented prior to the arrest of the owner without a warrant and upon mere suspicion. This question is deserving of the attention of this court by the allowance of a writ of certiorari herein so that a determination as to the validity of such practices might be made. The Constitution of the State of Florida, to wit, Section 22 of the Declaration of Rights, is practically identical with the provision of the Fourth Amendment to the federal constitution hereinabove specifically referred to.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

HAL S. IVES
712 Citizens Building
West Palm Beach, Florida
Attorney for Petitioner

IN THE SUPREME COURT OF FLORIDA

January Term A.D. 1966

Friday, June 24, A.D. 1966

Case No. 35,068

GEORGE THOMAS BECK, JR., *Petitioner*

v.

STATE OF FLORIDA, *Respondent*

On consideration of the Petition for Rehearing filed by Attorney for Petitioner,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY,

TEST:

SID J. WHITE
Sid J. White
Clerk Supreme Court

(I have today mailed to the Clerk of the District Court of Appeal, Second District, Order of May 23, 1966, in the above cause)

IN THE SUPREME COURT OF FLORIDA

January Term A.D. 1966

Monday, May 23, A.D. 1966

Case No. 35,068

GEORGE THOMAS BECK, JR., *Petitioner*

v.

STATE OF FLORIDA, *Respondent*

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal, Second District of Florida, in said cause bearing date January 5, 1966 and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A TRUE COPY,

TEST:

SID J. WHITE
Sid J. White
Clerk Supreme Court

cc: Hon. Joseph E. Gillen
Hon. John B. Dunkle
Messrs. Ives & Davis
Hon. Earl Faircloth

Not Final Until Time Expires To File Rehearing Petition and, If Filed, Determined

IN THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

July Term, A.D. 1965

Case No. 5925

GEORGE THOMAS BECK, JR., *Appellant*,

v.

STATE OF FLORIDA, *Appellee*.

Opinion filed January 5, 1966

Appeal from the Criminal Court of Record for Palm Beach County; Russell H. McIntosh, Judge

Garlon Davis of Ives and Davis West Palm Beach, for Appellant.

Earl Faircloth, Attorney General, Tallahassee, and Marvin U. Mounts, Jr., Solicitor, Criminal Court of Record, West Palm Beach, and Arden M. Siegendorf, Assistant Attorney General, Miami, for Appellee.

ALLEN, *Chief Judge*.

Appellant, defendant below, takes an appeal from judgment and sentence entered pursuant to a jury verdict. Defendant was convicted of robbery and sentenced to ten years in prison.

The case arose out of an armed robbery of a liquor store. The important facts on this appeal will be reviewed later.

We combine the first three of appellant's five points on appeal into one. Restated, appellant's points are:

(1) The search of appellant's automobile without a search warrant, not incidental to his arrest, is an

unreasonable search and the articles taken as a result thereof cannot be introduced into evidence.

(2) A pistol is not of itself contraband, nor is it unlawful under the laws of the State of Florida to have a pistol in an automobile.

(3) The trial court erred in giving an instruction to the jury that the unexplained recent possession of the stolen property raised an inference that the appellant had stolen such property.

In response to point (1), Florida has long recognized that evidence seized incident to a reasonable search only, can be introduced into evidence to help establish the guilt of an accused. Generally, a search is reasonable if made on the authority of a search warrant. Two exceptions to this rule are: (a) where the search is incident to a lawful arrest, (b) where a vehicle is searched on probable cause. Carroll v. U. S., 1925, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543, as incorporated in Section 933.19, Fla. Stats. See also for search and seizure, Reasonable Search and Seizure—an Expanding Enigma in Florida Prosecutions, 8 U. Fla. L. Rev. 288 (1955).

The prerequisite for search of a vehicle, not incidental to an arrest, is the officer's "probable cause" to believe the vehicle contains stolen or illicit merchandise. Cuozzo v. United States, 5th Cir. 1963, 325 F. 2d 274. Probable cause can be defined as, "where the facts or reasonable inferences deductible therefrom should lead a reasonably prudent and intelligent person to conclude that there is good ground to believe that the law is being [or was] violated." Pearson v. United States, 10th Cir. 1945, 150 F. 2d 219, 220.

We must examine the record to determine whether the officers who made the search of the automobile had "probable cause" to believe that appellant's automobile was the

same car that assisted the robber's "get-away" in order to determine if it contained the articles involved in the robbery.

A middle aged man entered Joseph Rubin's (Randy's) liquor store in Palm Beach. Mr. Barcalow, an employee, was behind the counter. The man asked for a bottle of Old Forester bourbon and a bottle of Smirnoff's Vodka. Mr. Barcalow placed the bottle of Old Forester into a paper bag, put the Vodka into a smaller bag and inserted it into the bag with the bourbon. When Mr. Barcalow looked up, the man pointed a silver or nickel plated revolver at him and told him to empty the cash register and his pockets. Meanwhile, Joseph Rubin, the owner of the store, entered. The man told Mr. Rubin to get behind the counter and empty his pockets. All the money, about $600.00, was put into the bag with the liquor. Almost as soon as the robber left the store, Mr. Rubin told Mr. Barcalow to call the police, ran outside and saw the robber jump into a tan Lincoln Continental. As Mr. Rubin ran after the car to determine its direction of flight, he yelled, "Stop that car, stop that car, there's been a hold-up, . . ." to arouse attention. The tan car went up Royal Palm Way east and turned right just before it hit the ocean. As the car was turning east, it lights were turned on and Mr. Rubin observed that the right rear tail light cover was broken and that it emitted a white light, while the left rear tail light, intact, was red. Officer Kirchbaum, who happened to be two stores away from the scene of the robbery, heard Mr. Rubin's shouts, and went to the liquor store. Mr. Rubin told this officer that a tan car with a broken right tail light was the robber's "get-away" car.

Two bystanders, who were also very near the scene of the robbery, followed the get-away car in their car and saw it turn into the Palm Beach Athletic Club parking lot several blocks away. The two men returned to the liquor store, picked up Officer Kirchbaum, took him to the Athletic Club

and pointed out to the officer the car they followed. Meanwhile, Sergeant Nelson, who was at the police station, overheard a radio call that there was a hold-up at Randy's Liquor Store.

On information received, the sergeant headed for the Athletic Club to look for a tan Lincoln Continental. When the sergeant arrived, he was told by Officer Kirchbaum that a tan car with a broken tail light was in the parking lot. At that point, Sergeant Nelson was looking for a tan Lincoln Continental with a broken right tail light. A car of this description was pointed out to Sergeant Nelson. He flashed his light through its open window and noticed a nickel plated revolver on the front seat and a paper sack on the floor of the passenger's side. Sergeant Nelson opened the door on the passenger side, took out the paper bag, looked inside and saw two bottles of liquor and money. Mr. Rubin verified the money and bottles as those taken in the robbery. The sack was put on the front seat with the gun. Sergeant Nelson stayed with the car while Officer Kirchbaum went inside the Club to find its owner, who had just driven in.

After the owner was pointed out as being one Mr. Beck, Officer Kirchbaum took him outside and arrested him. Mr. Rubin positively identified Beck as the robber. After the arrest, the car, pistol and sack with its contents were impounded.

The automobile was continuously pursued from the time of the robbery until the time of the contested search, approximately twenty to twenty-five minutes later. Sergeant Nelson, immediately before his search of the automobile, knew that the robber had driven a tan Lincoln Continental with a broken right tail light. Sergeant Nelson's knowledge and the discovery of the car's location after its continuous pursuit gave the sergeant probable cause to believe that the automobile pointed out to him in the parking lot of the Athletic Club, bearing the above described char-

acteristics, was the same one driven by the robber and contained the stolen money and liquor.

It matters not that the owner was not present at the time of the search. See, Ellis v. State, 1926, 92 Fla. 275, 109 So. 622; Armada v. United States, 5th Cir. 1963, 319 F. 2d 793.

In Miller v. State, Fla. App. 1962, 137 So. 2d 21, we said the officer had to procure a search warrant to look through the contents of the car because the vehicle was wrecked, impounded and in no danger of being spirited away. Here the car was in no way impounded and its owner could have driven it away before Sergeant Nelson could have obtained a search warrant. See, United States v. Walker, 4th Cir. 1962, 307 F. 2d 250, 252; Armada v. United States, supra.

The case authority cited by appellant, discussed below, is not relevant to the facts here presented. In Ippolito v. State, Fla. 1955, 80 So. 2d 332, the manner in which the search was conducted was unreasonable where the officer jumped upon the defendants and then seized the articles that they knocked from the defendants' possession. In the instant case the manner of the search was not unreasonable.

In Kreamer v. State, Fla. 1952, 60 So. 2d 615, an officer was informed that two unidentified cars had been meeting each other at night. One night the officer attempted to stop these cars but both drove away. Later on, the officer saw a car and "took a chance" that the unidentified car he saw was the same car that he intended to apprehend earlier. The search, following apprehension, where the officer had little more than no reason to believe that this car was the car he intended to stop earlier, was unreasonable. Here the identification of Beck's car, before it was searched, as the same car involved in the robbery was close to absolute.

In Cameron v. State, Fla. 1959, 112 So. 2d 864, the search and seizure of the appellant's car was made after a valid initial arrest of the defendant and at a time when the defendant was known to be a fugitive from justice and was being held on charges of auto theft and grand larceny in Wisconsin. The search was held to be reasonable.

Other cases relied upon by appellant concerning a search incidental to an arrest are not discussed.

We find from all the facts and circumstances that Sergeant Nelson had the requisite "probable cause" to search Beck's automobile and that the trial judge properly denied the appellant's motion to suppress as evidence the articles found in the search.

We need not discuss appellant's point (2) on appeal because we believe that Sergeant Nelson had "probable cause" to search the automobile before he saw the pistol on the seat.

Appellant's point (3) that the trial court erred in giving an instruction to the jury that the unexplained recent possession of the stolen property raised an inference that the appellant had stolen such property is unmeritorious. Appellant contended "that the court considered that the defendant was found in the 'exclusive possession' of the personal property described in the information." But the instruction was "Therefore, *if you find from the evidence,* that the defendant was found in the exclusive possession of the personal property described in the information, you may infer from this fact that the defendant stole the property . . ."

We find from a consideration of this instruction alone and within its context of the other given instructions, that it was proper.

Affirmed.

SMITH, SHERMAN N., JR., and ANDREWS, CHARLES O., JR., Associate Judges, concur.